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IN THE

Supreme Court of the United States

October Term, 1960

No. 465

DOYLE TERRY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Petition for the Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District, Division One.

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Petition for the Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District, Division One.

The petitioner, Doyle Terry, respectfully prays that a writ of certiorari issue to review a judgment of the District Court of Appeal of the State of California, in and for the Second Appellate District, Division One, in which the said judgment affirmed a judgment of conviction of the Superior Court of said State, in and for the County of Los Angeles, of three felonies, (1) Violation of Penal Code, Section 288, committed with a child; (2) a second violation of the same provision of the Penal Code involving a younger brother of the first child; and (3) violation of Section 286 of the Penal Code, the crime against nature committed upon the second child. The judgment imposes a penalty of a life maximum term of imprisonment. [*C. T. 1—Supplemental II.]

*Indicates Clerk's Transcript of Appeal.

Opinion Below.

The Opinion of the District Court of Appeal of the said State reviewing Court (an intermediate appellate Court), was rendered April 19, 1960, and is reported at 180 Advance California Appellate (Reports) at page 46. A petition for re-hearing was denied without opinion filed.

The Supreme Court of California, the highest Court of the State, summarily denied a petition for hearing without opinion on June 14, 1960, reported in the minutes at page 4 of 54 California Advanced (Reports), Volume 10.

Jurisdiction.

1. The judgment of said State reviewing Court, was dated and entered April 19, 1960, reported as above set forth.

2. A petition for hearing in the highest Court of the State, the California Supreme Court, was summarily denied without hearing or opinion, reported as above set forth, on June 14, 1960.

3. Upon application this Honorable Court extended the time to October 3, 1960, for the filing of the Petition for writ of certiorari by order dated September 12, 1960.

4. The statutory provisions believed to confer jurisdiction upon this Honorable Court to review the said judgment of the California reviewing Court, the highest State Court in which a decision could be had, by writ of certiorari are 28 U. S. C. A., Section 2101(d), and Rule 22(1) of the Rules of this Honorable Court.

Federal Question Presented.

1. Whether a judgment of a State Court should stand upon the reading of the testimony to the jury given by the alleged young victims, of sex abnormalities, at the preliminary examination, over defense objections when the record is clear that a judicial officer of the State permitted the witnesses to leave the jurisdiction and the prosecuting attorney, in a letter to the alleged vicims' father, suggested that the witnesses need not return to the California jurisdiction to give testimony at the trial as a condition of the original release, if there was any impelling reason for them not to return, the prosecutor arguing to the jury the impelling reason for the witnesses absence was "further embarrasement and poor school grades."

2. Whether the petitioner was accorded his Constitutional right to due process of law where the record reflects that responsible State authorities inadvertently or deliberately deprived the petitioner of the right to a fair and impartial trial in allowing the People's witnesses to leave the jurisdiction of the Court upon promise of their return for the trial and then the prosecutor's calculated suggestion that they do not re-appear as witnesses, and the reading of preliminary examination testimony of the alleged young victims to the jury over objections.

State Statutes Involved.

California Penal Code, Sec. 288;
California Penal Code, Sec. 286;
California Penal Code, Sec. 686(3);
California Penal Code, Sec. 879;
California Penal Code, Sec. 1008;

California Penal Code, Sec. 1334, Subds. 3 and 6;

California Penal Code, Sec. 1336;

California Constitution, Art. I, Sec. 13.

The text of these statutes is set forth in the Appendix to this petition.

Brief Statement of the Case.

The petitioner, Doyle Terry, was by information, filed by the District Attorney after preliminary examination and commitment by a magistrate, charged with sex crimes denounced by Section 288 of the Penal Code, in two counts, and one count of violation of Section 286 of the Penal Code of California. [C. T. pp. 1-3.] The accused entered a plea of not guilty [C. T. p. 5], the trial was by jury and resulted in guilty verdicts [R. T. p. 16]; a motion for a new trial was denied by the trial Court [C. T. p. 68]; the trial Court found the defendant to be a probable sexual psycopath and committed him to the State Hospital for a ninety day observation period [C. T. p. 69]; that upon returning from the State Hospital after a finding by the Medical Director that the defendant was not a sexual psycopath [R. T. p. 3 of Supplemental Transcript dated June 15, 1959]; the trial Court denied the application for probation and a judgment was rendered sentencing the defendant to the State Prison for the terms prescribed by law. [Supplemental C. T. II, p. 1.]

The defendant filed timely written notice of appeal [Supplemental C. T. II, p. 2], and the cause was transferred to the District Court of Appeal of the State of California, Second Appellate District for review pursuant to said Notice of Appeal.

Statement of Facts.

For the sake of brevity this statement of facts will be confined to the facts of the case pertinent to the questions involved, for the People's case depends and relies principally upon the absent witnesses testimony, given at the preliminary examination, read to the jury over objections.

It would serve no useful purpose here to relate in detail the testimony given at the preliminary examination by the alleged young victims of abnormal sex abuse, except that each specifically accused the petitioner of the violations.

After selection of the jury the Court, outside of the presence of the jury, inquired of the prosecutor if he was going to lay a foundation for the reading of the absent witnesses testimony (given at the preliminary examination), to the jury pursuant to Section 686 of the Penal Code. The prosecutor gave the Court an affirmative answer and defense counsel moved that the foundational testimony be taken out of the presence of the jury. [R. T. pp. 6-8.] The motion was denied by the trial Judge and the prosecutor was allowed to proceed with foundational testimony to which defense counsel objected to as prejudicial to the defendant's right to a fair and impartial trial and was granted a running objection to such testimony and procedure. [R. T. pp. 9-10.] The jury was instructed that the testimony was being introduced on the question of the propriety of allowing the prosecutor to read former testimony given at the preliminary examination of absent witnesses and that the jury was not to consider the foundational testimony on the question of guilt or innocence of the defendant on trial. [R. T. p. 11.]

A process server for the District Attorney's Office testified he received the subpoenas for the two alleged victim-witnesses; that he knew they resided at Arlington, Virginia. [R. T. pp. 13-18.] Objections made were overruled by the trial Judge to the question of whether he received any information where to serve the subpoenas [R. T. p. 21]; the Court's attention was again drawn to the jurors taking notes and the jurors remark they could not hear. The Court stated that the jury would again be admonished and if counsel indicated what questions would elicit prejudicial information the Court would excuse the jury, to which counsel stated that the defense could not tell in advance, particularly in going into a conversation, what would or would not be prejudicial to the rights of the defendant. [R. T. pp. 71-79.]

The witness was allowed to testify he instructed his secretary to call the father of the alleged victims, Captain Holden; that he talked to Captain Holden and the Captain said that he would not be in Los Angeles with his sons, the alleged victims, to testify at the trial of defendant, for on that date he would be in conference with the President of the United States and the children will be in school. [R. T. p. 35-36.] That the Captain related that he could not bring them out to testify at the trial or any time; that they already have had too much embarrassment, resulting in inferior grades in school; and the Captain wanted to know what had happened to the other defendants in the case. [R. T. pp. 37-38.] The Court admonished the jury they were not to consider the inference to the embarrassment of the boys. [R. T. pp. 37-38.]

On cross-examination the witness testified that he made the phone calls to Captain Holden and after send-

ing three letters, he did little or nothing to serve the subpoenas on the witnesses for their presence at the trial; that he had no intention of serving the subpoenas. [R. T. pp. 101-103.]

A second Investigator for the District Attorney testified that he received subpoenas for the witnesses on October 20 or 21, 1958, and in the outer lobby of the District Attorney's Office in the Hall of Justice in Los Angeles, California [R. T. p. 107], Captain Holden was not served with a subpoena made out in his name, but was served with subpoenas for his two sons, the alleged victims; that the two boys were not personally served with the subpoena, although he saw the two boys [R. T. pp. 107-110], and on the return of the subpoena's marked ". . . in care of Captain Richard Holden father, 10-21-58." [R. T. p. 111.]

While there was other foundational testimony it is passed over to the testimony of the particular prosecutor in charge of the prosecution of the case on trial. Mr. Howard, Deputy District Attorney, testified on cross-examination that he had heard that the witnesses were in Los Angeles on October 23, 1958, but did not show up in Court and by mutual consent of the prosecution and defense the case was put over for trial to another date. [R. T. p. 172.] The witness further testified that he considered the two alleged victims as "necessary" witnesses and the Court interrupted to add "not only necessary, they were essential witnesses." [R. T. p. 174.]

The People's witness, the Honorable Clark E. Stephens, Judge of the Superior Court, State of California in and for the County of Los Angeles, sitting in the Juvenile Court, testified that in making the order

to allow the victims to leave the State of California as "Non-delinquent" was with the provision that they return to be witnesses at the trial of this case. This testimony was given before the jury over objection of counsel. [R. T. pp. 145-146.]

The prosecutor in a letter to Captain Holden, the father of the two boys, stated in part ". . . if you have in your mind an impelling reason why they should not be here would you please write a letter and so indicate." [R. T. p. 208.]

In defense counsel's argument in support of the objection to the reading of the missing witnesses' testimony (at the preliminary examination), to the jury the federal question was raised that the reading of such testimony to the jury would be a denial of due process of law as the preliminary hearing was held as a consolidated hearing with another defendant (over objection), and that the transcript contained so much inadmissible matter so as to make it impossible to fairly extract the good from the bad. [R. T. pp. 244-251.]

It was called to the Trial Court's attention that the prosecutor would bring the witnesses back from out of state for the preliminary examination at county expense [R. T. p. 263]; further objection was made that the complaint only charged two offenses and after commitment by the magistrate the prosecutor filed an information charging three criminal offenses. [R. T. pp. 269-273.] It was also argued by defense counsel that due diligence was not established on the part of the people to show that the witnesses could not be served with subpoenas and brought before the court to testify. The Trial Court's reasons for over-ruling the objection and granting the motion of the people for the reading of

the testimony of the alleged victims at the preliminary examination to the jury is found in the Reporter's Transcript pages 284-295.

The trial of this case commenced with the prosecution reading to the jury the testimony given at the preliminary examination by the alleged victims. [R. T. pp. 351-474.]

The defendant pursued the federal question in the District Court of Appeal's Opening Brief pages 53, 62 and 71. The District Court of Appeal in affirming judgment of conviction considered the federal question in a manner not in accord with the decisions of this honorable court. For while the State Reviewing Court held that the appellant had a justifiable complaint to the use of foundational evidence before the jury and the reading of the missing witnesses former testimony to the jury, was not prejudicial or a violation of due process of law.

Manner Federal Question Was Raised.

The Federal question of violation of due process of law was raised in the Trial Court in presenting before the jury foundational evidence which was prejudicial to the defendant's right to a fair and impartial trial and the reading of the missing complainants testimony before the jury compounded the denial of the due process of law. [R. T. p. 250.] The Federal question was pursued in the District Court of Appeal of the State of California, Appellant's Opening Brief pages 53, 62, and 71, and further pursued in the Petition for Hearing to the Supreme Court of the State of California.

Summary of Argument.

Briefly stated the question presented to this honorable court is whether or not the defendant was deprived of a fair and impartial trial guaranteed to every accused by the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, by the taking of foundational evidence, before the jury, on a question of law, which was highly irregular and prejudicial to defendant, and the reading of former testimony of witness whose absence was the result of responsible state authorities, including the prosecutor's suggestion that they may remain out of the jurisdiction and need not testify again, and thus depriving the accused of all the elements of a fair trial to be confronted by his accusers and to cross-examine them before the court and jury. The affirmance of the judgmgent of conviction by the Reviewing Court of California cannot be the means to an end of removing the accused from society because of the nature of the offenses charged with a total disregard of constitutional rights, for the Constitution is as much for the protection of the accused on trial as it is for the protection of the witnesses appearing against him, and certainly, one accused of offenses of this nature, charges that are easily brought and hard to disprove, needs every protection of his rights to obtain a fair and impartial trial.

ARGUMENT.

The Use of Testimony of Two Juvenile Witnesses Taken at Preliminary Examination Who Were Permitted by District Attorney to Leave and Remain Absent From the State Amounted to a Denial of Due Process in Violation of the 14th Amendment to Federal Constitution.

The taking of foundational evidence for the introduction of former testimony of the alleged victims at the preliminary examination for the purpose of reading it to the jury as evidence of guilt, over objection and the reading of such testimony to the jury and the Reviewing Court's affirmance of the judgment of conviction, is in direct conflict with applicable decision of this Honorable Court and diametrically opposed to a fair and impartial trial guaranteed to the accused by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. In the interest of brevity we will not here repeat the pertinent evidence but it now appears that the District Attorney was well aware that the Juvenile Judge was allowing the alleged victims to leave the jurisdiction of the Court. The prosecution returned these alleged victims at state expense as witnesses at the preliminary examination against the accused. The prosecutor in a method that might be termed legal gymnastics suggested in a letter to the father of these alleged victims that if some impelling reason could be given the boys would not have to return as witnesses at the trial of the defendant.

The District Attorney's investigator testified to an impelling reason why the father was not returning with his two sons as witnesses at the trial; that the father, Captain Holden, stated in a telephone conversation that he could not bring his sons to California to testify because he would be in conference with the President of the United States.

The testimony given by these two young boys at the preliminary examination, to the defendant's prejudice and deprivation of a fair and impartial trial, was read to the jury over objections of defense counsel at which time it was granted a denial of the due process of law.

The opinion of the California Reviewing Court in affirming the judgment attempts to white-wash this prejudicial foundational evidence presented by the prosecutor by stating that the father's importance as high government official in the armed services, who held conferences with the President of the United States, was offset by things which might be considered derogatory as a divorce or a lack of parental supervision.

The Reviewing Court's opinion that the procedure complained of was justified because the father of the boys said to the District Attorney's investigator that they have had too much embarrassment and were getting low grades in school certainly cannot justify the unconstitutional violation of due process of law, the right to be confronted by the alleged victims before the Court and jury and further cross-examination which is universally held to be the method of seeking the truth. It was the prosecutor's duty to produce the alleged victims as witnesses at the trial for testimony before the jury and the right of cross-examination by the defense or to dismiss the prosecution against the defendant.

In *People v. Kuranoff*, 100 Cal. App. 2d 673, at 676, the Court states:

> "The right of a defendant in a criminal action to be confronted by the witness against him, in the presence of the court, is a valuable and substantial one . . . . 'as this is a right clearly connected with his personal liberty, any statute purporting to impair the right is to be, liberally construed in his favor,' and the state must 'bring itself clearly within the provisions of that statute.'"

The Supreme Court of California in *People v. Kiihoa* (Feb. 29, 1960), 53 Adv. Cal. 751, held:

> "It is next contended that because there was no procurement of or active participation by the law enforcement agency in Stough's removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that police did not arrange for Stough's absence. The critical question, however, is not necessarily one of improper conduct in bringing about Stough's absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded that the circumstances surrounding this prosecution affected and militated against the defendant's right to a fair and impartial trial."

In the *Kiihoa* case, *supra*, the state authorities did not suffer the absence of the desired witnesses, while in the present case the witnesses were allowed to leave the jurisdiction of a Superior Court Judge with a prom-

ise that they would return as witnesses for the trial. The record shows that the prosecutor suggested that some impelling reason.

these witnesses need not appear at the trial if there was

The fact that the father, if it was a fact, was to be in conference with the President of the United States during that particular time, was not an impelling reason for the witnesses not appearing at the trial for it was the sons and not the father who were to be witnesses. Nor is embarrassment or low school marks an impelling reason for the absence of the witnesses for no one could be heard to say that a victim-witness in a case such as this would not be embarrassed and a psychological effect of giving such testimony would, no doubt, result in an emotional disturbance and impair efficiency to some extent. Such is not and cannot be the law, else in all such cases the victims would not have to appear as witnesses and be subjected to cross-examination, rights that are guaranteed by our Constitution.

In the present case there were statements and evidence given since the preliminary examination that could have been used as a vehicle of impeaching the alleged victims had they testified at the trial before the jury. The case of *People v. Kiihoa, supra*, follows the rule set down by this Honorable Court in *Motes v. United States*, 178 U. S. 458, in which it was demonstrated that it was not necessary to show that the state procured the witnesses' absence, but was not "responsible" for the witnesses' absence.

It has been, since the commencement of the trial to the present time, that the complained of state Court procedure deprived the accused of the right to a fair and impartial trial in violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13, of the California Constitution, specifically set up and pleaded in the State Courts for the protection of the accused against the wrongs of respondent.

Conclusion.

Wherefore, petitioner respectfully prays that a writ of certiorari be granted directed to the District Court of Appeal of the State of California in and for the Second Appellate District, Division One, to the end that a full hearing may be had herein, and to the end that this petitioner in the alternative may be discharged, and for such other and further relief as to the Court may seem fair and just.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner.